

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original & Affidavit of Mailing

77-1241

To be argued by
ELIA WEINBACH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1241

UNITED STATES OF AMERICA,

Appellee,

—against—

PAUL PRIMIANO,

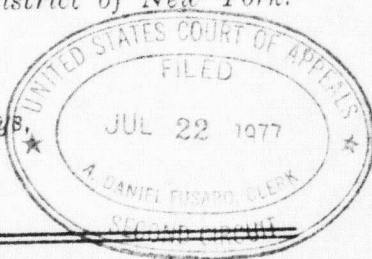
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

ALVIN A. SCHALL,
ELIA WEINBACH,
*Assistant United States Attorneys,
Of Counsel.*



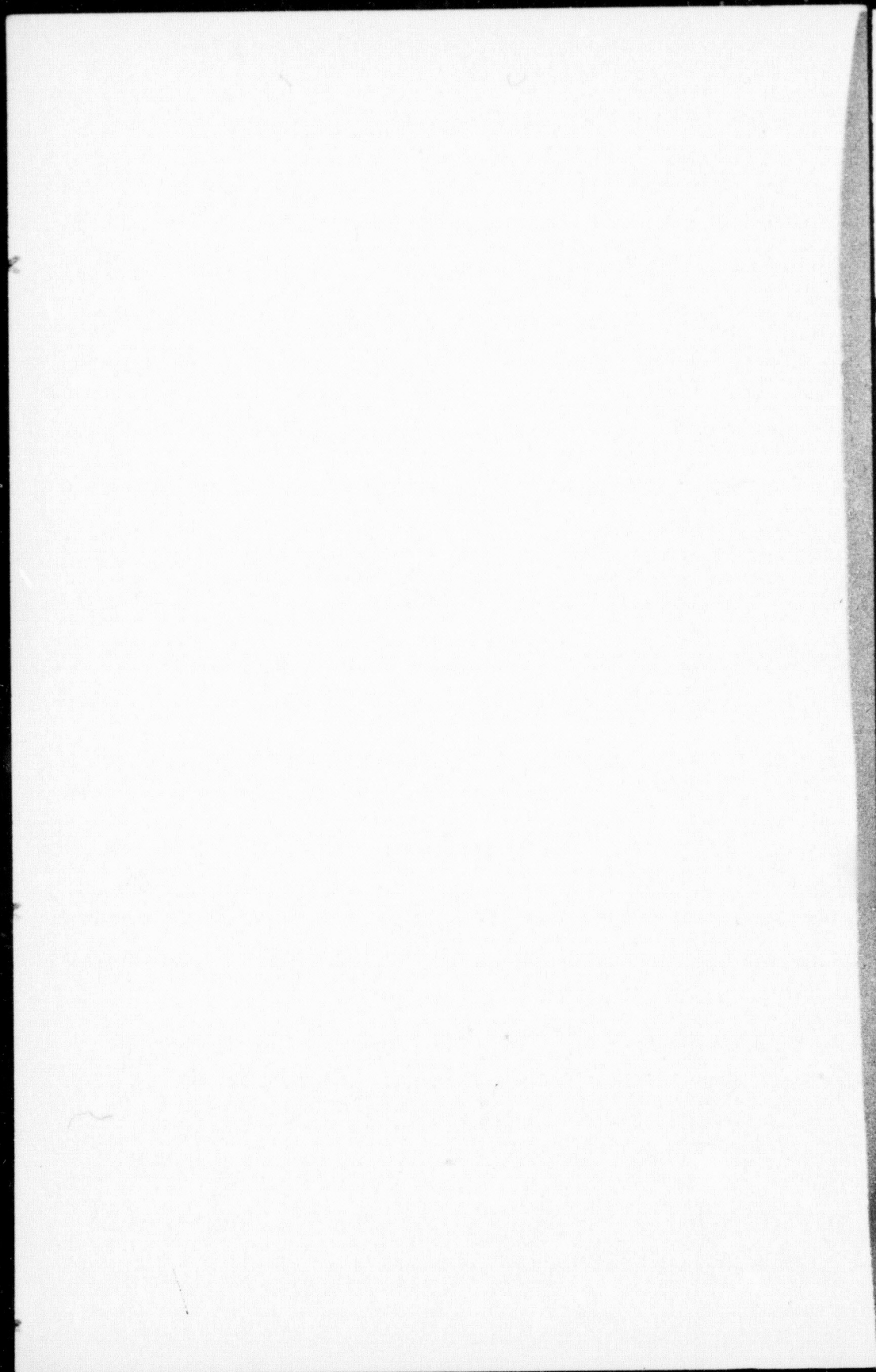
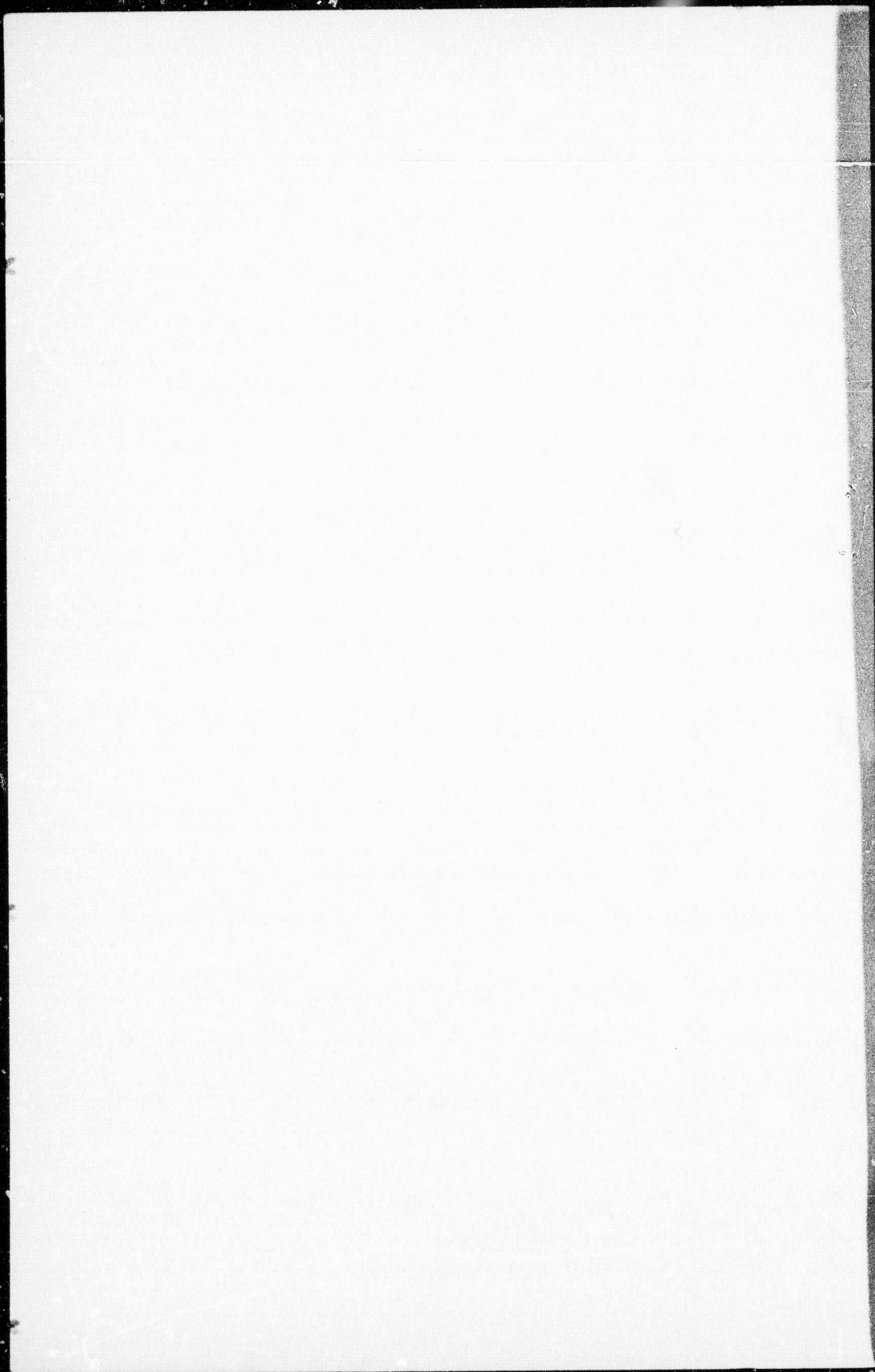


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Docket No. 77-1241

UNITED STATES OF AMERICA,

Appellee,

—against—

PAUL PRIMIANO,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Paul Primiano appeals from a judgment of the United States District Court for the Eastern District of New York (Jack B. Weinstein, J.) entered on April 27, 1977, convicting him, after a jury trial, of obstructing interstate commerce by attempting to rob a truck, in violation of Title 18, United States Code, Section 1951.¹ Primiano

¹ Primiano was also charged, with an unidentified man, "John Doe," with conspiring to obstruct interstate commerce, in violation of Title 18, United States Code, Section 371. However, Judge Weinstein dismissed the conspiracy count before submitting the case to the jury.

was sentenced to a term of ten years imprisonment and is now in custody serving his sentence.²

Primiano's sole claim on appeal is that his right to a jury trial was violated by the jury's lengthy deliberations, which were allegedly caused by Judge Weinstein, and also by Judge Weinstein's allowing the jury to continue deliberating after a juror indicated in a note to the court that he had personal matters which required his presence away from the courthouse.

Statement of Facts

A. The Government's Case

The evidence in this short trial showed that on May 28, 1976, Primiano attempted to hijack a tractor-trailer on Staten Island and that in his attempt, he fired a gun at the driver. The chain of events began that day when the driver, John Campbell, an employee of May Trucking Company of Elizabeth, New Jersey, picked up his tractor in Elizabeth and drove to Nassau Recycling on Staten Island, where a trailer containing pig lead was hooked up to the tractor (14).

At approximately 11:00 A.M., Campbell began driving with his load to the Lehigh Valley Railroad depot in Newark, New Jersey. Shortly after leaving Nassau Recycling, he approached a stop sign in a wooded area of Staten Island and began to make a left turn (23). As

² Prior to and during the course of the trial, Primiano was free on bail. Immediately after the jury had rendered its verdict, the court found, on the basis of its impression that Primiano had lied on the witness stand and because a gun had been fired in the attempt to rob the truck, that Primiano was a danger and menace to society. Thus, Primiano's bail was revoked and he was remanded (233).

Numbers in parentheses refer to pages of the trial transcript.

Campbell was shifting the gears of his tractor, he heard a man say, "Open the door, I got a gun." (15). The man was standing on the passenger side of the tractor, and Campbell saw that he was holding a gun in his right hand (56). Campbell was so frightened that his foot "froze" on the accelerator and the tractor-trailer proceeded through the intersection, and eventually struck the curb on the opposite side of the highway (16). As a result of the tractor's hitting the curb, the man standing with the gun either fell or jumped off the tractor (16). When the tractor hit the curb, the man's gun fired (16). Just prior to the firing of the gun, the man had switched the gun to his left hand (57), and had tried to break the tractor window, which was open about two inches (17). After the man fell off the tractor, Campbell saw another man running alongside the tractor (17). Campbell then drove his tractor-trailer to the toll booth area of the Outerbridge³ where he reported the incident to one of the Port Authority officers who was on duty.

Shortly after the attempted hijacking, Campbell described his assailant, who only stayed on the running board of the tractor for three to four seconds (17), to a Federal Bureau of Investigation (F.B.I.) agent as a short, curly-haired, white man (18). Two months later, in July of 1976, Campbell was shown various photographs by the F.B.I. (among which was Primiano's) but was not able to identify the hijacker from any of the pictures (19). In December of 1976, Campbell viewed a lineup in which Primiano was standing but was not able to pick him out as the man who had tried to hijack his truck in May (19, 109-10).⁴

³ The Outerbridge is a bridge which connects Staten Island to New Jersey (129).

⁴ The photograph of Primiano shown to Campbell on July 2, 1976 was not a good likeness of Primiano and was taken ten years prior to May 1976 (112, 147). A photograph of Primiano taken on July 27, 1976, at the time of his arrest, was shown to the jury but not to Campbell (147).

At about 3:30 P.M. on May 28, 1976, New York City Police Detective Frederick Ballou processed Campbell's tractor for latent fingerprints. The tractor was parked about fifty feet west of the Outerbridge toll booth, where it had been driven by Campbell (64). Detective Ballou "dusted" for fingerprints only on the passenger side of the trailer, on the door handles, mirror, support bars and outside window (64-65). He then dusted the inside of the passenger window, along the top edge, approximately four inches from the top down (65-66). Ballou noticed that the passenger window was clean and open four or five inches (65). He obtained a latent fingerprint from the inside right (passenger) window, approximately one inch and one-half from the top (67, 73). The fingerprint was pointing downward (67).

The latent fingerprint found by Detective Ballou on the inside, at the top edge of the passenger window, was compared with the fingerprint provided by Primiano after his arrest (82). At trial, an F.B.I. fingerprint specialist testified that the latent fingerprint on the tractor was identical to the left index fingerprint of Primiano (89).⁵

In addition to establishing that Primiano's fingerprint was located on the inside passenger window of Campbell's tractor, the Government's evidence showed that there was little likelihood that Primiano could have had access on May 28, 1976, to the tractor-trailer. First, Campbell testified that in May 1976 he cleaned the inside of his tractor, including the passenger window, every day (21, 29). Second, Campbell drove the same tractor everyday, and, after completing his work he would park the tractor in a locked garage. Third, Campbell testified that Primiano had never been a passenger in his tractor, and

⁵ Two other latent fingerprints were also found on the right side door handle but these were not Primiano's (94).

he also stated that he had never seen him at May Trucking, Nassau Recycling or at the Outerbridge area on May 28th. In addition, witnesses from Nassau Recycling and May Trucking Company established that the areas surrounding the tractor-trailer were secure areas (102, 105) and that Primiano had never worked for either establishment nor did he have authority to enter the secure areas (103, 106). Finally, Detective Ballou testified that when he got to the Outerbridge area there was another detective and a police officer by the tractor-trailer, which was ringed off and secured by cones, and no crowd had gathered by the tractor (64, 105).

B. The Defense Case

Primiano testified in his own behalf. He stated that on May 28, 1976, he was fishing for crabs on Staten Island under the Outerbridge crossing (121). Primiano, who lived in Staten Island, claimed that between 11:00 A.M. and noon, as he was going toward the bridge along a service road, he saw police cars and about twelve to fifteen people around a tractor-trailer (121). The tractor-trailer was parked on the side of the bridge facing New Jersey where cars would not have to stop to pay tolls (29-30). Primiano said he stopped his car and walked over to the tractor-trailer. He said he was "nosy" and that he looked around (122). He did not talk to anyone, but heard people talking about a "shooting or something" (122). He looked at the tractor-trailer and may have touched it but he did not really know if he had (122).⁶ By his own account, Primiano spent about a minute to a minute and one-half by the tractor-trailer, and then drove under the bridge where he went crabbing (123).⁷

⁶ Primiano was not wearing gloves on May 28, 1976 (132).

⁷ The Government recalled in rebuttal Detective Ballou, who testified that he had lived on Staten Island all his life, that he

[Footnote continued on following page]

C. The Jury Deliberations

The jury began to deliberate at approximately 4:50 P.M. on March 7, 1977, the only day of trial (202). Various exhibits were requested by the jurors, including the pictures of Campbell's truck, the fingerprints, and the lineup pictures (202-203). At 8:05 P.M., Judge Weinstein advised the jury, in response to a note, that the verdict had to be unanimous and that there was no such thing as a split verdict. Furthermore, he told the jurors: "You have only deliberated a very short time, based on my experience, and I know it's a difficult matter." (204). After a short time, the jury was excused for the evening.

On the following day, March 8th, the jury requested the testimony of the F.B.I. fingerprint specialist and Primiano, and the testimony was read by the Court Reporter (212). The jury was taken out for lunch (214), and at 4:20 P.M. the jury advised the court in a note that it was deadlocked, eight to four for conviction. The note further stated that, "we cannot come to a unanimous decision. Please advise us what we should done (sic)" (215).^{*} The jury was then called into the courtroom, at which point Judge Weinstein stated:

I want you to continue your deliberations. The verdict has to be unanimous. Each has to have his own individual opinion, but you are all mature sensible people, you understand the evidence.

It isn't going to be much different if we have to retry it, so if it's possible to talk it out and arrive at a solution that you all find acceptable in view of the evidence, the law sees that as preferable.

was a fisherman and had gone crabbing on occasion, and that on the ten times that he had been in the area under the Outerbridge he had never seen anyone fishing or crabbing (161). Detective Ballou also stated that the water under the Outerbridge was not conducive to fishing (163).

^{*} The note is reproduced in appellant Primiano's Appendix, p. 13.

I don't want to coerce you in any way. I want you to think it through but these cases are expensive for the Defendant the Government and for the citizens, and if I can avoid a retrial by having you discuss it thoroughly and come to a conclusion, that's always preferable (216).

The jury thereafter continued its deliberations until 5:25 P.M. (217).

On the following day, March 9th, the jury deliberated from approximately 10:00 A.M. to 3:40 P.M. when a note was sent to the court from juror member four. The note⁹ stated:

Your Honor—

I am imploring you to consider the dire circumstances that confronts me—my place of employment is terminating its business on Friday, March 11th at 4:30 P.M. I have to report to 150 Broadway, New York City today between 4 and 5 o'clock union headquarters to sign for my severance and vacation pay—tomorrow I must, if I can possible, return to my place of employment to discuss my pay. I am under the impression due to their terminating their business that I may not receive my salary (while on jury) because after Friday there will be no one there but the movers. If it is possible I would appreciate a recess or a postponement for today and tomorrow—After I deal with my employer and union I can again resume my position as juror.

Thank you
Albert Gergel
Jury # 4

I am going under a pressure and sugar strain now—

⁹ The note is reproduced in appellant Primiano's Appendix pp. 14-15.

After receiving the note from juror number four, Judge Weinstein brought the jury into the courtroom and asked juror number four:

The Court: Juror 4, you want to go home early today?

Juror No. 4: If I may, your Honor.

The Court: Do you have to be off all day tomorrow?

Juror No. 4: Not necessarily.

The Court: What time can you get here?

Juror No. 4: I can be in after 11:00 o'clock in the morning.

The Court: 11:30. Is that suitable for everybody? Take the rest of the day off. (221).

After the jury was excused, counsel for Primiano moved for a mistrial based on the note sent to the Court by juror number four (222-224). Judge Weinstein denied the motion and observed:

I don't believe that the jury is under pressure. They seem very relaxed to me. We all knew that this man had diabetes. He had a personal problem I am giving him this time off today, and tomorrow he indicated there was no problem after 11:30. The jury will come back relaxed, and we will continue.

The jury deliberated the following day, March 10th, from 11:30 A.M. until 3:30 P.M. when it reached a verdict of guilty (227). The jury was polled and then discharged. Counsel for Primiano then moved to set aside the verdict on the ground of insufficiency and because allegedly the jury was coerced into reaching a verdict. The court denied the motion and stated:

The Court: Motion is in all respects denied. the Court observed the jury very carefully. They were relaxed when they came in with the verdict. They deliberated from 11:30 until the noté came in, which was about 3:25. In addition, they had time off for lunch.

The Court has had many cases in which the verdict was for acquittal, even though the notes coming out indicated as much as a 10 to 2 verdict for conviction.

The Court has had many cases where the deliberations were far longer than this where the jury even 11 to 1, 11 to acquit and 1 to convict, decided that they couldn't agree. Each one of the jurors here was quite mature and responsible, and I believe that the defendant received a fair trial in view of the very, very fine defense counsel, and the work of the defendant, it's understandable that the jury did have difficulty. I can't see any point in a new trial (232).

The record shows that, excluding the time taken off for lunches, dinners, and the reading of testimony, the jury deliberated perhaps two and one-half working days before arriving at a verdict.

ARGUMENT

Appellant Primiano's Right To A Jury Trial Was Not Violated By Any Action Of The Trial Court.

Appellant argues that his right to a jury trial was violated because of Judge Weinstein's "insistence" that the jury continue its deliberations for several days, an "insistence" which appellant asserts coerced the jury into rendering a verdict of guilty. Appellant also contends that it was unfair of Judge Weinstein to require juror number four to continue deliberating after he had expressed concern about his poor health and the fact that he might miss receiving his final paycheck. We submit that both arguments are without merit.

As appellant has conceded in his brief, the well-settled rule is that the trial court has broad discretion to decide how long jury deliberations should last. *United States v. Minieri*, 303 F.2d 550 (2d Cir. 1962); *United States v. Novick*, 124 F.2d 107 (2d Cir. 1941), *cert. denied*, 315 U.S. 813 (1942). Contrary to appellant's claim, the record here shows no coercion at all; indeed, Judge Weinstein's conduct and statements throughout the course of the jury deliberations, including his consideration of juror number four's personal problems, manifested a reasoned and sensible response to the jury's needs, which resulted in a voluntary and deliberate jury verdict.

As already pointed out in the fact portion of our brief, Judge Weinstein was extremely solicitous of the time needs of the jury. It was only on the first day of trial, when the jury deliberated from 4:50 P.M. to 8:45 P.M., that the jury was kept beyond business hours. On the second day, the jury deliberated from 10:00 A.M. to 5:25 P.M., excluding the time during which it was taken out to lunch and had the testimony of two witnesses,

including appellant's, read back. On the third day, the jury deliberated until 3:40 P.M. when it was excused to accommodate juror number four's personal problems. Likewise, on the fourth and final day, the jury was allowed to begin deliberating at 11:30 A.M. to accommodate juror number four, and it reached a verdict at 3:40 P.M. Thus, in all, the jury deliberations, carried out in normal hours, took perhaps two and one-half full days. By way of contrast, this Court, in *De Grandis v. Fay*, 335 F.2d 173 (2d Cir. 1964), a habeas corpus proceeding, upheld a state court judge's action in having a jury deliberate for twenty-four consecutive hours after: (1) a three and one-half month trial; (2) a three hour charge; and (3) after the jury twice advised the court of its fatigue. This Court stated that "the mere fact that a jury has been without sleep will not vitiate its verdict if its agreement was deliberate and voluntary and not due to fatigue and exhaustion." *De Grandis v. Fay*, *supra*, 335 F.2d at 175. See also, *United States v. Minieri*, 303 F.2d 550 (2d Cir. 1962) (jury deliberated for nine hours until 12:00 midnight). We thus submit that appellant's arguments based upon coercion from a temporal standpoint are groundless since in the instant case there was no indication of fatigue. In fact, at the close of the third day's proceedings, Judge Weinstein remarked upon how rested and relaxed the jurors appeared. (224).

Furthermore, Judge Weinstein never suggested to the jurors that there was any time limit to their deliberations or that they would be kept until they reached a verdict. In *United States v. Green*, 523 F.2d 229 (2d Cir. 1975), this Court, in upholding the denial of a motion for a new trial on the basis of a juror's note which indicated that the jury in a multi-defendant case had reached a compromise verdict, observed that "[a]t no time did the district judge instruct the jury that it must return a verdict by a certain time." *United States v. Green*, *supra*, 523 F.2d at 236.

We submit, as well, that Judge Weinstein's statements to the jury after the court had been advised that there was a deadlock were entirely proper. The jury was called to the courtroom and Judge Weinstein said in part:

I want you to continue your deliberations. The verdict has to be unanimous. Each has to have his own individual opinion, but you are all mature and sensible people, you understand the evidence.

It isn't going to be much different if we have to retry it, so if it's possible to talk it out and arrive at a solution that you all find acceptable in view of the evidence, the law sees that as preferable.

I don't want to coerce you in any way. I want you to think it through but these cases are expensive for the Defendant, the Government and for the citizens, and if we can avoid a retrial by having you discuss it thoroughly and come to a conclusion, that's always preferable (216).

This Court has regularly upheld the giving of this type of modified *Allen* charge. *United States v. Rodriguez*, 545 F.2d 229 (2d Cir. 1976); *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir.), *cert. denied*, 425 U.S. 970 (1976); *United States v. Hynes*, 424 F.2d 754, 757 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970).

Finally, with respect to Judge Weinstein's handling of juror number four's personal problems, we submit that the court's actions and statements prove our point that the judge was extremely considerate of the jury's needs and exercised good judgment in allowing the jury to reach a voluntary verdict. It is obvious from the content of juror number four's note that what troubled him was the loss of his severance and vacation pay. Indeed, appellant concedes that the court showed "some" concern for the juror's

predicament. In fact, the court permitted the jury to leave early on the third day and come late on the fourth day to accommodate juror number four, who had stated, in his note as well as in open court, that he could continue to deliberate. Juror number four indicated that he could deliberate after 11:00 A.M. the next day, and there was no indication whatever, apart from a postscript to his note, that he was in any medical discomfort or stress that would have prohibited him from further deliberation. Thus, appellant's conclusion that juror number four's "display of emotional distress, negating an untroubled and clear mind, which is required of every juror, made it impossible for him to deliberate on the evidence" (Appellant Primiano Brief, at 11-12) is refuted by the record.

By way of comparison, we cite *United States v. Grosso*, 358 F.2d 154 (3d Cir. 1966), *rev'd on other grounds*, 390 U.S. 62 (1968), where a female juror became ill during late evening deliberations after the jury had earlier indicated that it was deadlocked. The juror was given medical attention, and the court was advised that the woman was suffering from a nervous disorder. The juror reported the following day to deliberate and since she was still diagnosed ill, the jury, over defense counsel's objections, was asked to suspend its deliberations for a day. On the next day, the juror was still ill but she continued to deliberate. The jury then informed the court that it was deadlocked, and the district judge then asked counsel if they would agree to having the case decided by a jury of eleven. Defense counsel objected. The entire jury continued its deliberations and on Saturday evening, at 8:30 P.M., the jury returned its verdict of guilty. On these facts, the Third Circuit held that the district court's actions were not coercive and affirmed the conviction. The Court stated that although the illness of a juror may, in connection with a note indicating a deadlock, be a coercive circumstance, there was no evidence

of such coercion. The court also rested its decision on the fact that when the jurors were polled there was no indication of any coercion or inducement.

In *United States v. Pleva*, 66 F.2d 529, 532 (2d Cir. 1933), relied upon by appellant, an elderly juror reported in open court that he was sick and that he might die. A motion to discharge the jury was denied, and upon consent of all parties, the sick juror was examined by a doctor, who reported to the court that the juror was afflicted with asthma and bladder trouble, but could continue nevertheless to deliberate. Another doctor was called and reported that the juror was in considerable pain, but agreed with the first doctor that the juror could continue to deliberate when he was informed that the juror did not have to be in the courtroom. The juror was provided with sedatives and at 9:15 P.M. the jury returned ~~x~~ verdicts of guilty. When the jury was polled, the sick juror alluded to his medical difficulties (At 532). Upon these facts, this Court, in reversing the convictions, stated that the sick juror "made it plain that he did not agree to the verdict on the evidence and the law. His agreement, induced by his longing for relief from ills partly real at least, was but the result of coercion even though no coercion was intended (At 533)." Furthermore, the Court noted that "we are not dealing with a situation where a verdict has been regularly returned and recorded with nothing at the time to show that it was other than the unanimous agreement of the jurors based on the evidence and the law (At 533)."

In the instant case, juror number four's concern for his physical condition was clearly secondary to his anxiety over losing pay. In addition, as in *Grosso*, and quite unlike the situation in *Pleva*, the results of the jury poll indicated clearly the lack of any coercion since each juror, including juror number four, unequivocally stated that his or her verdict was guilty. Appellant's claim is without merit.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
July 20, 1977

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

ALVIN A. SCHALL,
ELIA WEINBACH,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 22nd day of July 19⁷⁷ he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Litman, Friedman & Kaufman Esqs. 120 Broadway, New York, N.Y. 10005

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County
of Kings, City of New York.

Dolores Byrd

Sworn to before me this

22nd day of July 19⁷⁷

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979